

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 16, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2216**

**Cir. Ct. No. 2012TR992**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**VILLAGE OF MUSCODA,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SAMUEL R. ANDERSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Grant County:  
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.<sup>1</sup> Samuel R. Anderson appeals a judgment of conviction for operating a motor vehicle while under the influence of an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

intoxicant, first offense (OWI) and challenges the denial of his motion to suppress the evidence. Anderson argues that the arresting officer lacked probable cause to administer a preliminary breath test (PBT) and, with or without the result of the PBT, lacked probable cause to arrest Anderson for OWI. We disagree and affirm.

### **BACKGROUND**

¶2 The following facts are undisputed and taken from the suppression hearing. At approximately 1:33 a.m. on January 29, 2012, Officer Paul Schaaf of the Village of Muscoda police department observed a vehicle traveling northbound that did not have working taillights. Officer Schaaf followed the vehicle into a parking lot and pulled up next to the vehicle. Officer Schaaf approached the driver of the vehicle, later identified as Anderson, and immediately noticed the odor of intoxicants coming either from the vehicle or from Anderson himself. Officer Schaaf also noticed that Anderson had bloodshot eyes and slightly slurred speech.

¶3 Officer Schaaf asked Anderson whether he had been drinking, and Anderson stated he had “a couple beers” at a party. The officer observed that there were two large bottles of vodka on the passenger seat of the vehicle, one that was empty and a second that was between one-quarter and one-third empty. Officer Schaaf questioned Anderson about the bottles, and Anderson stated that the bottles of vodka were cranberry juice. Anderson tried to place a bottle of cranberry juice on top of the bottles of vodka in an apparent attempt to hide the bottles of vodka from Officer Schaaf. Anderson later admitted that the two bottles of vodka belonged to him and that he consumed two vodka and cranberries and three beers at a party that night.

¶4 Officer Schaaf asked Anderson to perform field sobriety tests. Anderson informed Officer Schaaf that he had a knee injury that might affect his ability to perform the tests but that he would try to complete the tests. Officer Schaaf began by administering the horizontal gaze nystagmus (HGN) test, but the officer admittedly failed to administer the HGN test in accordance with his training. Officer Schaaf then administered the walk-and-turn test. Officer Schaaf testified that Anderson performed the test “fairly well” but noted that Anderson began the test before he was instructed to do so, placed his hands in his pockets instead of at his sides, stumbled when he took his first step, and failed to consistently touch heel to toe. Finally, Officer Schaaf administered the one-leg-stand test. After Anderson made two failed attempts to balance on one leg, Anderson informed Officer Schaaf that he could not complete the test because of his alleged knee injury. Officer Schaaf then administered a PBT, which indicated that Anderson had a blood alcohol content of .173. Officer Schaaf placed Anderson under arrest for OWI.

¶5 Anderson moved to suppress the evidence on the grounds that Officer Schaaf lacked probable cause to administer the PBT and improperly relied on the numeric result of the PBT in determining that there was probable cause for arrest. The circuit court denied Anderson’s motion to suppress. Anderson appeals.

## **DISCUSSION**

¶6 Anderson argues that the officer lacked probable cause to administer the PBT. Specifically, Anderson argues that the officer’s “cursory observation” of Anderson when contact was first initiated, “coupled with either improperly administered or unsuitable field sobriety tests” failed to establish “probable cause

to believe” that Anderson was operating a motor vehicle while intoxicated. We disagree.

¶7 An officer has probable cause to administer a PBT when the officer has “probable cause to believe” that the person was operating a motor vehicle while intoxicated. *See* WIS. STAT. § 343.303. “Probable cause to believe” refers to a “level of proof greater than the reasonable suspicion necessary to justify an investigative stop but less than that required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 314, 603 N.W.2d 541 (1999). A PBT is used as a “screening test before establishing probable cause for an OWI arrest.” *Id.* at 307. An officer has “probable cause to believe” when the totality of the circumstances known to the officer at the time the officer administers the PBT would lead a reasonable officer to believe that the individual was operating a motor vehicle while intoxicated. *See State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). We will uphold the circuit court’s findings of fact unless clearly erroneous. *Renz*, 231 Wis. 2d at 316. Whether those facts meet the “probable cause to believe” standard is a question of law subject to de novo review. *Id.*

¶8 The circuit court relied on the following facts in support of its determination that Officer Schaaf had probable cause to administer the PBT:

- The officer stopped Anderson around 1:30 a.m. because Anderson’s vehicle did not have working taillights.
- The officer noticed that there was an odor of intoxicants and that Anderson had bloodshot eyes and slightly slurred speech. The officer also noticed the open intoxicants in the vehicle.

- The officer administered field sobriety tests. Even ignoring the results of the HGN test because the officer did not conduct that test in accordance with his training, Anderson exhibited clues of intoxication on the walk-and-turn test and one-leg-stand test.

¶9 We conclude that the circuit court's findings of fact are not clearly erroneous,<sup>2</sup> and that, based on these facts, Officer Schaaf had probable cause to believe Anderson violated the OWI statute.

¶10 The record supports the circuit court's findings of fact. At the time of the traffic stop, Officer Schaaf noticed an odor of intoxicants emanating from Anderson's vehicle or Anderson himself and observed that Anderson had bloodshot eyes and slightly slurred his speech. Anderson initially lied about the contents of the two large bottles of vodka and the amount of alcohol he consumed that night, but later admitted that the bottles contained vodka that belonged to him and that he had consumed five drinks over the course of the night, including two vodka and cranberries and three beers. Although there is no dispute that the results of the HGN test were unreliable, Anderson's performance on the walk-and-turn test suggested that he might be intoxicated because he started the test before he was instructed to do so and failed to keep his hands at his sides. Considering the totality of the circumstances, we conclude that Officer Schaaf had probable cause to administer the PBT.

¶11 Anderson makes several arguments pertaining to whether there was probable cause to administer the PBT, all of which we reject. First, Anderson

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<sup>2</sup> Anderson does not challenge the circuit court's factual findings.

argues that Officer Schaaf lacked probable cause to administer the PBT because Anderson's driving did not suggest to Officer Schaaf that Anderson was impaired. We have already explained that an officer has probable cause to administer a PBT when the totality of the circumstances would lead a reasonable officer to believe that the individual was operating a motor vehicle while intoxicated. *See Babbitt*, 188 Wis.2d at 356. Accordingly, an officer may have probable cause to administer a PBT even when an officer observes no signs of impaired or erratic driving, when other information known to the officer at the time the officer administers the PBT would lead a reasonable officer to believe that the individual was driving while intoxicated, such as in this case.<sup>3</sup>

¶12 Anderson next argues that Officer Schaaf lacked probable cause to administer the PBT because there could be many reasons why Anderson had bloodshot eyes and slightly slurred speech other than that he was intoxicated. While a driver may have bloodshot eyes and slightly slurred speech for reasons other than that he or she is intoxicated, we conclude that the totality of the circumstances in this case provided Officer Schaaf with probable cause to believe that Anderson was intoxicated. A reasonable officer would believe that Anderson was intoxicated based on the time of night of the traffic stop, the odor of intoxicants, the bottles of vodka found on the passenger seat, Anderson's bloodshot eyes and slightly slurred speech, and Anderson's admission that he had two vodka and cranberries and three beers at a party that night. Moreover, an officer is not required to rule out innocent explanations for conduct before determining that there is probable cause to administer a PBT. *See State v. Nieves*,

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<sup>3</sup> We note that Anderson does not dispute that Officer Schaaf had reasonable suspicion to conduct a traffic stop because the taillights on Anderson's vehicle were not working.

2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (“[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause.”).

¶13 Anderson further argues that, while Officer Schaaf had reason to believe that Anderson consumed some amount of alcohol because Anderson admitted that he consumed five drinks at a party that night, Officer Schaaf lacked probable cause to believe that Anderson was operating a motor vehicle while intoxicated because Anderson’s performance on the field sobriety tests did not establish that he was intoxicated. We reject that argument. It is well established that when there are indicators that an individual has operated a motor vehicle while intoxicated but the individual’s performance on the field sobriety tests suggests that the individual may not be intoxicated, the officer may administer a PBT to assist in determining whether there is probable cause for arrest. *Renz*, 231 Wis. 2d at 310-11. In fact, an officer may administer a PBT regardless how an individual performs on field sobriety tests because field sobriety tests are not required to establish probable cause to administer a PBT, where other indicators exist that provide probable cause to believe that an individual was driving while intoxicated. See *State v. Felton*, 2012 WI App 114, ¶10, 344 Wis. 2d 483, 824 N.W.2d 871.

¶14 In sum, we conclude, based on the totality of the circumstances, that the officer had probable cause to believe that Anderson was operating a motor vehicle while intoxicated. Consequently, the officer had probable cause to administer the PBT.

¶15 Anderson next makes an argument regarding the admissibility of the numerical result of a PBT when a defendant challenges his or her arrest. We

understand Anderson to argue that the result of a PBT is admissible only for qualitative breath alcohol analysis, defined as “a test of a person’s breath, the results of which indicate the presence or absence of alcohol,” and not for quantitative breath alcohol analysis, defined as a “chemical test of a person’s breath which yields a specific result in grams of alcohol per 210 liters of breath.” WIS. ADMIN. CODE § Trans 311.03(12), (13). Relying on these definitions, Anderson argues that a PBT, as a qualitative breath alcohol analysis, may be used only to indicate the presence or absence of alcohol in a person’s blood stream, and not for the purpose of determining the amount of alcohol in a person’s blood. Therefore, Anderson argues, the numeric result yielded by a PBT may not be used to establish probable cause for arrest. We see several problems with this argument.

¶16 The statute governing the use of PBTs, WIS. STAT. § 343.303, provides, in relevant part:

The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested .... The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged ....

The language of § 343.303 plainly states that a law enforcement officer may administer a PBT and rely on the PBT result in court to demonstrate probable cause for an arrest, where a defendant challenges the arrest, as in this case. We observe that the statute makes no reference to the administrative code to define “result” and thus Anderson’s attempt to narrow the meaning of “result” as a qualitative measure lacks support in the statute. In addition, the only reasonable reading of the term “result,” when read in context of the entire statute, is as a measure of the amount of alcohol in a person’s blood at the time the test was



administered. Anderson's narrow reading of "result" renders meaningless the use of a PBT result for the purpose of determining probable cause for arrest. Even Anderson points out on appeal that using the PBT result for the narrow purpose of ascertaining whether alcohol is present in a person's blood only duplicates what an officer can readily observe from smelling a person's breath or checking for slurred speech and bloodshot eyes. To give meaning to the term "result," we conclude that the legislature intended for the numeric result of a PBT to be admissible at a hearing to establish probable cause for an arrest, where the defendant challenges the arrest.

¶17 Having determined that the numeric result of a PBT is admissible in court to show probable cause for an arrest, we conclude, based on the totality of the facts known to Officer Schaaf at the time of the stop, that there was probable cause to arrest Anderson for OWI. The same facts relied on by the circuit court in determining that the officer had probable cause to administer the PBT also support the circuit court's determination that there was probable cause to arrest Anderson. *See supra* ¶8. In addition, the officer had the benefit of the PBT result, which indicated that Anderson had a blood alcohol content of .173, more than double the legal limit. An objective view of the facts would lead a reasonable officer to conclude that Anderson was operating his motor vehicle while intoxicated, and therefore, Officer Schaaf had probable cause to arrest Anderson for OWI.

### CONCLUSION

¶18 Based on the foregoing reasons, we affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)4.

